

(16,855.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 282.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.s.

MARIA AMACKER, J. J. AMACKER, HER HUSBAND; G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED, AND GEORGE DIBERT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Be it remembered, that on the 8th day of May, 1891, the plaintiff herein filed its complaint, which is in the words and figures as follows, to wit :

2 In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Complaint.

For cause of action against said defendants plaintiff complains and alleges :

I. That it is a corporation, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, 3 by the northern route," and those acts and joint resolutions supplementary thereto and amendatory thereof.

II. That it is and was, at all the times hereinafter mentioned, the owner of, and entitled to the possession of the south half of the northwest quarter of section seventeen (17), township ten (10) north, of range three (3) west, of the principal meridian of Montana.

III. That on the — day of —, 1890, while the plaintiff was seized in fee-simple of said land, the said defendants, without right or title, entered into possession thereof, against the will and without the consent of the plaintiff and ousted and ejected plaintiff therefrom, and now unlawfully withhold possession thereof from plaintiff.

IV. That said land is of the value of over ten thousand dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of possession of said land, and for its costs and disbursements herein.

CULLEN, SANDERS AND SHELTON,
F. M. DUDLEY, *Att'y's for Plaintiff.*

STATE OF MONTANA,
County of Lewis and Clarke, }^{ss:}

4 F. M. Dudley, being duly sworn says: That he is an officer of
 the above-named plaintiff, to wit, its general land attorney;
 that he has read the foregoing complaint and knows the con-
 tents thereof, and that the same is true according to his best
 knowledge, information and belief.

F. M. DUDLEY.

Subscribed and sworn to before me this 6th day of May, 1891.

[SEAL.]

CHAS. H. COOPER,
Notary Public.

(Endorsed:) Title of court and cause. Complaint. Filed May 8, 1891. Geo. W. Sproule, clerk.

5 And on the said 8th day of May, 1891, a summons was
 duly issued herein; which said summons as duly returned is
 in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Mon-
 tana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
 vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. }
 Howell, George Gotthardt, Walter H. Little, Alexander J. }
 Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert }
 B. Reed, and George Dibert, Defendants. }

Summons.

Action brought in the said circuit court and the complaint filed in
 the office of the clerk of said circuit court, in the city of Helena,
 county of Lewis and Clarke.

6 The President of the United States of America, Greeting: To
 Maria Amacker, John J. Amacker, her husband; George
 S. Howell, George Gotthardt, Walter H. Little, Alexander J.
 Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B.
 Reed, and George Dibert, defendants.

You are hereby required to appear in an action brought against
 you by the above-named plaintiff, in the circuit court of the United
 States, ninth circuit, in and for the district of Montana, and to file
 your plea, answer or demurrer, to the complaint filed therein (a
 certified copy of which accompanies this summons), in the office of
 the clerk of said court, in the city of Helena, and county of Lewis
 and Clarke, within 20 days after the service on you of this sum-
 mons, or judgment by default will be taken against you.

The said action is brought to recover from you said defendants

the possession of that certain piece, parcel or tract of land described as follows: The south half of the northwest quarter of section seventeen (17), township ten (10) north, of range three (3) west, of the principal meridian of Montana; which you said defendants on the — day of —, 1890, while plaintiff was seized in fee-simple, ousted and ejected plaintiff therefrom and now unlawfully withhold possession thereof from plaintiff, and for costs and disbursements herein; all of which is more fully set out in the original complaint on file herein, to which reference is hereby made, and if you fail to appear and plead, answer or demur, as herein required, your
7 default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the 115.

[SEAL.]

GEORGE W. SPROULE, *Clerk,*
By — — —, *Deputy Clerk.*

UNITED STATES MARSHAL'S OFFICE, }
District of Montana. }

I hereby certify that I received the within writ on the 8th day of May, 1891, and personally served the same on the dates named, days of May, 1891, by delivering to and leaving with Maria Amacker and John J. Amacker (16), Frank H. Pings (26), A. J. Steele, W. H. Little, Geo. S. Howell, Geo. Dibert, J. Jordan, Geo. Gotthardt, John Blank (12th). Said defendant named therein personally, at the county of Lewis and Clarke in said district, a certified copy thereof, together with a copy of the complaint, certified to by clerk of said circuit court attached thereto.

W. F. FURAY,
U. S. Marshal,
By GEO. LEEKLEY, *Deputy.*

Helena, May 27th, 1891.

(Endorsed :) Filed June 6th, 1891. Geo. W. Sproule, clerk.

8 And thereafter, to wit, on the 20th day of June, 1891, the answer of certain defendants was filed herein, which said answer is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,

^{vs.}

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Answer of Defendants Geo. S. Howell et al.

The defendants, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, who appear by Thos. C. Bach, their attorney, for answer to the complaint herein—

9 1st. Deny that the plaintiff is or ever was the owner of or entitled to the possession of the south half of the northwest quarter of section 17, township 10 north, of range 3 west, of the principal meridian of Montana, or any part thereof.

2nd. Denies that defendants or any of them ever or at all ousted or ejected plaintiff from said premises or any thereof, or that they or any of them unlawfully withheld the possession thereof or any thereof from such plaintiff.

Wherefore defendants pray judgment against the plaintiff, that the complaint of plaintiff be dismissed, and that they recover their costs in this case expended.

THOS. C. BACH,
Attorney for Defendants Named.

STATE OF MONTANA, {
County of Lewis and Clarke, }^{ss}:

Walter H. Little, being duly sworn, says that he is one of the defendants answering herein, and that he and they are united in their interests and pleading in this case, and that he is acquainted with the facts of this case; that he has read the foregoing pleading and knows the contents thereof, and that the facts therein stated are true to his own knowledge, except as to those matters which are therein stated on his information and belief, and as — those matters that he believes it to be true.

WALTER H. LITTLE.

10 Subscribed and sworn to before me this 20th day of June, 1891.

THOS. C. BACH,
*Notary Public in and for Lewis and Clarke
County, State of Montana.*

I do hereby certify that in my opinion the foregoing answer is well founded in law.

THOS. C. BACH,
Attorney for Defendants.

Service of the above answer this 20th day of June, 1891, admitted.

CULLEN, SANDERS AND SHELTON,
Att'ys for Plff.

(Endorsed:) Title of court and cause. Answer. Filed June 20, 1891. Geo. W. Sproule, clerk, by W. J. Kenn-dy, deputy clerk.

11 And thereafter, to wit, on the 18th day of March, 1892, the answer of defendants Maria Amacker and John Amacker, her husband, was filed herein; which said answer is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the Ninth Circuit,
District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Answer of Defendants Maria and J. J. Amacker.

Separate answer of Maria Amacker and John J. Amacker, her husband.

12 And now comes Maria Amacker and John J. Amacker, two of the defendants above named, and for their separate answer to the complaint of the plaintiff.

First. Deny that the said plaintiff is, or was at all the times, or any of the time, or ever the owner of or entitled to the possession of the south half of the northwest quarter of section number seventeen (17), in township ten (10) north, of range three (3) west, of the principal meridian of Montana, or that plaintiff is, or ever was the owner of or entitled to the possession of any part or portion of said premises.

Second. Deny that the plaintiff was at the time mentioned in said complaint seized in fee-simple of said land or had any interest therein, and deny that these defendants, or either of them without right or title entered into the possession thereof, and deny that these defendants, or either of them, ousted or ejected the plaintiff from said premises, or any part thereof, and deny that these defendants, or either of them, now unlawfully withhold possession of said premises from the plaintiff.

Wherefore, having fully answered said complaint, these defendants pray to be discharged with their costs in this behalf expended.

MASSENA BULLARD,
Attorney for Answering Defendants.

13 STATE OF MONTANA, {
County of Lewis and Clarke. { 88

Maria Amacker being duly sworn says: That she is one of the answering defendants named in the foregoing answer, and acquainted with the facts therein stated; that she has read the foregoing answer and knows the contents thereof and that the same is true of her own knowledge except as to those matters which are therein stated upon her information and belief and as to those matters she believes the same to be true.

MARIA AMACKER.

Subscribed and sworn to before me this fifteenth day of March,
in the year of our Lord 1892.

J. MILLER SMITH,
Notary Public.

Due and legal service of the within answer accepted this sixteenth day of March, A. D. 1892.

CULLEN, SANDERS AND SHELTON,
Att'ys for Plff.

(Endorsed): Title of court and cause. Separate answer of Maria Amacker and John J. Amacker.

14 And thereafter, to wit, on the 18th day of December, A. D. 1895, the following agreed statement of facts was duly filed herein in the words and figures as follows, to wit:

In the United States Circuit Court for the District of Montana.

**NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.**

MARIA AMACKER, JOHN J. AMACKER, Her Husband ; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Agreed Statement of Facts.

It is hereby stipulated, and agreed, by and between the parties hereto, that, for the purpose of the trial of this action, the following facts shall be deemed and taken to be true:

15

1

That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route."

II.

That by the terms of said act, said company was authorized and empowered to lay out, locate, and construct a railroad and telegraph

line, with the appurtenances, from a point on Lake Superior, in Minnesota or Wisconsin, thence westerly by the most eligible route, to be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three miles from its western terminus.

That by the third section of said act it was provided:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line 16 to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims of rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

That by the sixth section of said act of Congress, it was, among other things, enacted and provided as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or 17 entry, or pre-emption before or after they are surveyed, except by said company as provided in this act."

III.

The said Northern Pacific Railroad Company duly accepted the terms, conditions, and impositions of said act, and signified such acceptance in writing, under the corporate seal of said company; duly executed pursuant to the directions of its board of directors first had and obtained, and within two years after the passage of said act, to wit, December 29, 1864, severed such acceptance on the President of the United States.

IV.

That February 2, 1870, and March 10, 1870, the board of directors of said railroad company authorized the executive committee to survey and locate the main and branch lines of said railroad.

V.

That afterward, to wit, July 8, 1870, the said executive committee of the board of directors of said railroad company, by resolution provided as follows:

"Resolved, That the president cause a preliminary location with a map of the main road of the Northern Pacific Railroad Company, commencing at Whatcom, on Puget sound, thence running southwardly on the easterly side of the said sound to Portland, in Oregon,

18 and from the point where the said railroad crosses the Columbia river, and on the north side thereof and by the valley

of the said river to the mouth of Snake river, to be filed in the office of the Secretary of the Department of the Interior at Washington at as early date as practicable. Also to cause a like preliminary location with a map of the main line from the point on the Red river where the said road may cross the said river, running thence to the Missouri river at the point of intersection of the Yellowstone with the Missouri, and thence up the valley of the Yellowstone to a point in the Rocky mountains, which shall be common to a line to be run either down the valley of the Salmon river or the Clearwater river, and to file the said map with the Secretary of the Interior at Washington.

VI.

That afterward, to wit, July 26, 1870, the president of said railroad company transmitted to the Secretary of the Interior two maps showing the preliminary line of general route of said road, one exhibiting that portion of said road beginning on Lake Superior, at the mouth of the Montreal river, and extending thence to a point on the right bank of the Columbia river, opposite the mouth of Walla Walla river, in Washington; the other that portion extending from the mouth of Walla Walla river, westerly to the terminus on Puget sound. That the line as shown upon said map was more than forty miles from the south half of the northwest quarter (S. $\frac{1}{4}$ N. W. $\frac{1}{4}$) of section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

19 That the said maps so transmitted to the Secretary of the Interior were received by that office on July 30, 1870. That August 4, 1870, and before said maps had been accepted by said Secretary, and before any action had been taken with reference thereto, the engineer-in-chief of said railroad company, Edwin F. Johnston, addressed to the Secretary of the Interior the following letter:

"Northern Pacific Railroad Company, engineer's office, 120 Broadway.

NEW YORK, Aug. 4th, 1870.

Hon. J. D. Cox, Secretary of the Interior.

D'R SIR: From information received from my assistants in Montana and Idaho, since my return here from Washington, it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line situated between the mouth of Boulder creek on Jefferson river in Montana and the Columbia river.

There is reason to fear that the valley of the Salmon river may be found impracticable, in which case the company will be compelled to take the next valley to the north of it—the Clearwater. The president of our company is absent for some days in Minnesota and I desire you not to take any action on the portion of the route named until he returns or I can communicate with him.

Yours very respectfully,

EDWIN F. JOHNSTON,
Eng.-in-chf. N. Pacific R. R."

20 That said letter was duly received by the Secretary of the Interior, and thereafter, to wit, August 5, 1870, the said Secretary replied as follows:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., August 5th, 1870.

SIR: I have received your letters of the 2nd and 4th instant—the first relatnig to the legislation as to the main line and branch of the Northern Pacific railroad and the second stating it may be necessary to change the route of the road in Idaho from the valley of the Salmon river to that of the Clearwater, and asking suspension of action on that portion of the map until you can advise with the president of the company.

In reply, I state that I see no objections to a compliance with your request and action will be accordingly suspended.

Very respectfully, your obt. servt.,

J. D. COX, Secretary.

Edwin F. Johnston, Esq., eng.-in-chf. N. P. R. Co., 120 Broadway, New York."

That thereafter, to wit, August 13, 1870, the said Secretary of the Interior transmitted said map to the Commissioner of the General Land Office, with the following instructions:

21 "DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., August 13, 1870.

SIR: I transmit herewith two maps showing the designated route of the Northern Pacific railroad.

You will immediately direct the proper local land officer in the States of Wisconsin and Minnesota to withhold from sale, pre-emp-

tion, homestead, and other disposal of the odd-numbered sections not sold, reserved, and to which prior rights have not been attached, within twenty miles on each side of the route, and in like manner direct those officers in Washington Territory to withhold such odd-numbered sections as lie south of the town of Stielacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly; and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully your obt. servant,

HON. JOS. S. WILSON,
Commissioner of the General Land Office."

Afterward, to wit, in September, October, and November, 1870, the Commissioner of the General Land Office, under the foregoing directions of the Secretary of the Interior, withdrew from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public land falling within twenty miles of, and coterminous with, that portion of said line extending through the 22 States of Wisconsin and Minnesota; and within forty miles of that portion of said line extending through the Territory of Washington. That no action was then or ever thereafter, taken with reference to that portion of said line extending through the Territories of Dakota, Montana, and Idaho.

VII.

That thereafter the said Northern Pacific Railroad Company proceeded with the survey and location of the general route of its said railroad, extending from the Red River of the North westward to a point in Washington, on the eastern bank of the Columbia river, where it intersected the line of general route as shown upon the map filed August 13, 1870, and accepted and approved by the Secretary of the Interior; and having surveyed and located such portion of its said line of general route, it filed a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, on the 21st day of February, 1872.

That thereafter, to wit, April 22, 1872, the Commissioner of the General Land Office under the direction of the Secretary of the Interior transmitted to the register and receiver of the United States district land office at Helena, Montana, a plat showing so much of said line of general route as extended through the district of lands for sale at said office at Helena, Montana, and designated thereon the limits including the lands coterminous with, and within forty miles of, said line, and transmitted with said map or diagram, the following:

23

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, April 22, 1872.

Register & receiver, Helena, Mont.

GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad, under the act of July 2nd, 1864, and by direction of the Secretary of the Interior you are hereby directed to withhold from sale or location, pre-emption or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within these limits, and dispose of them at that ratability, and under the pre-emption laws only. No private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner."

That said diagram and order of withdrawal were received at said United States district land office at Helena, and duly filed therein, May 6, 1872. That the land in controversy, to wit, the south half 24 of the northwest quarter (S. $\frac{1}{4}$ N. W. $\frac{1}{4}$) of section seventeen (17) township ten north of range three (3) west, P. M. Montana, was on and within forty miles of said portion of said line as shown upon said diagram so transmitted to the United States district land office at Helena, Montana, as aforesaid, and was included within the forty-mile limits as designated on said diagram.

VIII.

That thereafter the said Northern Pacific Railroad Company surveyed and definitely located the line of its railroad, extending through said district of lands for sale at Helena, Montana, and July 6, 1882, fixed said definite location by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office.

That the said line of definite location so fixed was coterminous with, and within twenty miles of, said land, hereinbefore described. That the plat showing that portion of said line of definite location was duly received and filed in the United States district land office, at Helena, Montana, June 21, 1883.

IX.

That thereafter said Northern Pacific Railroad Company proceeded with the construction of its said railroad and telegraph line on, over and along its said line as so definitely located, and completed the same opposite to and coterminous with said described

land on or about July 1, 1883. That the completion of said railroad and telegraph line having been reported to the President of the United States, said President thereupon appointed three commissioners to examine the same, and it appearing to said commissioners that said portion of said railroad and telegraph line had been constructed in a good, substantial and workmanlike manner, in all respects as required by said act of Congress, they so reported to the President of the United States, and recommended that said portion of said railroad, being a section more than twenty miles in length, be accepted.

That thereafter, to wit, on the 1st day of October, 1883, the said President of the United States duly approved the said recommendation, and directed that the patents earned by the construction of said railroad and telegraph line should be issued to said railroad company.

X.

That on July 2, 1864, the said south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of said section seventeen, township ten (10) north, of range three (3) west, P. M. Montana, was public land to which the United States had full title, not reserved sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That it was then, has been at all times since, and is now, non-mineral land; and except as such condition may have been changed by the proceedings herein set forth, said land has been at all times herein mentioned, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That said 26 described land has been at all times, and is now, within the district of lands for sale at the United States district land office at Helena, Montana.

XI.

That October 5, 1868, one William M. Scott, then a citizen of the United States over twenty-one years of age filed in the United States district land office at Helena, Montana, his pre-emption declaratory statement, No. 179, under and in conformity with the provisions of the laws of the United States authorizing pre-emption cash entry of the public lands, wherein and whereby he made pre-emption claim to the south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the north half of the southwest quarter (N. $\frac{1}{2}$ S. W. $\frac{1}{4}$) of said section seventeen (17), township ten north, of range three (3) west, P. M. Montana, alleging settlement as of the same day. That said declaratory statement was accepted and filed in the said United States district land office at Helena, Montana, and was duly and regularly noted on the records thereof. That such declaratory statement and filing is still of record in said land office and has never been canceled, unless cancellation results as a matter of law from the proceedings herein set forth. That said Scott settled upon said land on October 5, 1868, and afterwards, to wit, in the spring of 1869, built a house thereon and moved into it.

XII.

That October 20, 1869, said Scott filed his pre-emption declaratory statement No. 719, amendatory of said declaratory statement No. 179, in said United States district land office at Helena, Montana, wherein and whereby he alleged settlement upon, and asserted claim to, under the pre-emption laws of the United States, the south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the northeast quarter of the northwest quarter (N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$) of said section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

XIII.

That said Scott continued to reside upon said premises until the fall of 1869, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he moved to the city of Butte, Montana. That he never returned to said described land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and at the said time abandoned the said land.

XIV.

That October 14, 1872, said William M. Scott filed a new amended declaratory statement, No. 2807, under the pre-emption laws of the United States, wherein he alleged settlement upon certain described land, and made claim thereto under the said laws of the 28 United States authorizing pre-emption cash entry of unoffered lands. That said declaratory statement did not cover or include the said south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of section seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana.

XV.

That May 3, 1872, one William McLean, being then a citizen of the United States over twenty-one years of age and qualified under the law to enter lands under the homestead laws of the United States, duly applied under an act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, to enter the west half of the northwest quarter (W. $\frac{1}{2}$ N. W. $\frac{1}{4}$), the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) and the southwest quarter of the northeast quarter (S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of section seventeen, township ten (10) north, of range three (3) west P. M. Montana, and was then and there permitted by the register and receiver of said United States district land office at Helena, Montana, to enter said land, under and in accordance with the provisions of said act of Congress; and that thereupon said McLean did make an affidavit as required by section 2290 of the Revised Statutes of the United States, and filed the same with the register and receiver of said land office; and his said entry was then and there noted upon the records of said office; and that the said William McLean in September, 1872, 29 moved onto the said premises a frame dwelling-house constructed of boards set up and down and covered with a shingle

roof, and having a door and window, and put into said house a cook stove and its proper furniture, together with a bed, and from that time until the spring of 1873 spent his nights in said house upon said premises, and in the spring of 1873 he was married to the defendant Maria Amacker and ceased to reside on said premises.

XVI.

That on the first day of December, 1874, the Commissioner of the General Land Office wrote to the register and receiver at Helena, Montana, that the said homestead entry of said McLean was held for cancellation, and for the reason that the same was made subsequent to the time at which the rights of the Northern Pacific Railroad Company attached to the said described land.

XVII.

That July 3, 1879, the register and receiver of the United States district land office at Helena, Montana, transmitted to the Commissioner of the General Land Office the following letter, to wit:

"UNITED STATES LAND OFFICE,
HELENA, MONTANA, July 3rd, 1879.

Hon. Com. Gen'l Land Office, Washington, D. C.

SIR: We have the honor to report that June 2nd, 1879, the applicants to the following homestead entries were duly notified, 30 in accordance with your circular of December 20th, 1879, to show cause within thirty days from date of said notice why their entries should not be canceled, and up to this date no action has been taken. No. 819, William McLean W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, sec. 17, 10 N., 3 W., made May 3, 1872.

We would respectfully recommend that these homestead entries be canceled.

Very respectfully,

J. H. MOE, *Register.*
F. P. STERLING, *Receiver.*"

That said letter was duly received by said Commissioner. That afterward, to wit, September 11, 1879, said Commissioner transmitted to the register and receiver of the United States land office at Helena, Montana, the following letter:

"SEPT. 11, 1879.

Register and receiver, Helena, Montana.

GENTLEMEN: I am in receipt of your letter of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified, in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz: No. 819, made May 3, 1872, by William McLean, W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ E. $\frac{1}{4}$ 17, 10 N. 3 W.

31 In view of the facts that the above entries were held for cancellation in November and December, 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and having failed to establish their claims after due notice given, the said entries are hereby cancelled.

Advise the parties in interest.

J. M. ARMSTRONG,
Acting Commissioner.

The circular of December 20, 1873, referred to in the above letters, is as follows:

Circular.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December 20, 1873.*

GENTLEMEN: In a number of cases, persons who have initiated titles to the public lands under the homestead law have allowed the limitation provided by the statute to expire without making the final proof of settlement and cultivation required by the act.

Therefore, in all such cases as now exist in your district or may hereafter arise, you will notify the parties of their non-compliance with the law, and that thirty days from date of service of notice will be allowed to each of them within which to show cause why their claim shall not be declared forfeited and their entries canceled. At the expiration of that time you will report the reasons given, on, in case of failure, report that fact, so that in either event proper action may be had by this office.

32 But you will in no case allow the lands embraced in such claims to be reinstated until you shall have received from this office a formal notice that the original entries have been positively canceled. I append a form of notice which you will be pleased to adopt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

Registers and receivers, United States land offices.

Form of Notice.

A— B— (place of residence, or, that being unknown, address to the post-office nearest to the land).

SIR: You are hereby notified that the homestead law requires final proof of settlement and cultivation to be made within two years after the expiration of five years from the date of entry and that in case of your entry No. —, for —, dated — the —, the time fixed by the statute has expired without the requisite proof being filed by you. You will, therefore, within thirty days from the date of service of this notice, show cause before us why your claim shall not be declared forfeited and your entry canceled for non-compliance with the requirements of the law so that the case

may be reported to the Commissioner of the General Land Office for proper action.

(Date.)

— — —, *Register.*
— — —, *Receiver.*

33 That the defendant, Maria Amacker (formerly Maria McLean) the widow of said William McLean, has not in her possession, and is unable to produce, a letter or order to said William McLean issued in 1879, or at all, directing him to show cause why his said entry should not be canceled, and has no knowledge that such order was ever received by said William McLean. That the custom of the United States district land office in sending out notice to show cause, under the said circular of December 20, 1873, is to issue the notice on the printed blank. That the said blank form is filled in with the name of the entryman and sent to the proper parties by registered mail, and no copy thereof is retained in the land office. That after diligent search no copy of the letter claimed to have been sent to said McLean on June 2, 1869, has been found in said United States district land office. That it is not the practice to make an entry of the notice so sent out, further than by the copy of the letter advising the Commissioner of the General Land Office of the transmission of such notice to the entryman. It was also the custom when such notice was sent to receive from the postmaster to whom the letter was delivered a receipt therefor, also a receipt from the person to whom it was sent, which it was the custom to send to the department as evidence that the notice was served; the records of the Land Office do not show any such receipt.

That until September 11, 1879, there was no cancellation of McLean's homestead entry, but that said homestead entry was canceled at said time in pursuance of the above letter of acting Commissioner dated Sept. 11, 1879, and not otherwise.

34

XVIII.

That said McLean never settled upon or improved said described land.

XIX.

That said William McLean died in August, 1882; and that Maria Amacker (then Maria McLean, widow of deceased) was appointed his executrix, he left a will and testament which was duly admitted to probate by which he devised to said Maria McLean the premises in controversy.

XX.

That March 15, 1883, Maria McLean, widow of said William McLean, as such applied to the said United States district land office at Helena, Montana, to purchase said described land, and to perfect her husband's entry thereof, under the provisions of the act of Congress of June 15, 1880, and section 2291 of the Revised Statutes of the United States.

XXI.

That the said Northern Pacific Railroad Company contested said application. That the United States district land officers at Helena, Montana, awarded to said Maria McLean the right to purchase said tract under said application. That said Northern Pacific Railroad Company thereupon appealed to the Commissioner of the General Land Office from the action of the register and receiver and that February 20, 1885, the Commissioner of the General Land Office sustained the application of said Maria McLean to purchase said described land, and confirmed the decision of the local land office-s at Helena, Montana. That said railroad company appealed from said decision, and said decision was affirmed by acting Secretary of the Interior, H. S. Muldrow, on March 28, 1887. That the decision of the Secretary of the Interior and of the Commissioner of the General Land Office, are in words and figures following:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Feb. 20th, 1885.

Register and receiver, Helena, Montana Ter.

GENTLEMEN: I have considered the cash entry of Maria McLean, widow of Wm. McLean, No. 1134, made March 15, 1883, under sec. 2 of act of June 15, 1880 (21 Stat., 237) on the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, sec. 17, T. 10, N. B. three west.

Said tracts are within the withdrawal of odd-numbered sections for the benefit of the grant to the Northern Pacific Railroad Company, upon the map of the general route of said company's road filed in this office Feb. 21st, 1872, ordered by letter, from this office dated April 22, received at your office May 6th, 1872.

There are also within the forty-mile (granted) limits of the definite located line of said company's road, the map of which was filed in this office, July 6, 1882.

36 The records show that the pre-emption declaratory statement covering said tracts were filed as follows:

No. 75, by A. J. Wetter, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, with other tracts, May 13, 1868, alleging settlement same day.

No. 179, by Wm. M. Scott, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, with other tracts October 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

No. 252, by Jerome S. Glick, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, with other tracts, Nov. 27, 1868, alleging settlement the same day.

No. 776, by Robert C. Wallace, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, with other tracts, December 13, 1869, alleging settlement the same day.

May 3, 1872, Wm. McLean made homestead entry No. 819 on said W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$.

The letter directing the withdrawal of the lands for the grant stated that the order would take effect from the date of its receipt at your office.

March 22, 1873, the Secretary of the Interior decided (Copp L. L., 3-282

1875, p. 377) that the withdrawal took effect upon the filing and acceptance of the map of general route.

McLean's entry having been made after the filing of such map, was held for cancellation by this office Dec. 1, 1874, subject to appeal within sixty days.

No appeal was taken from this action. Under date July 3, 1879, the local officers reported that McLean had been duly notified 37 pursuant to office circular of Dec. 20, 1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with law within the statutory period, and that he had taken no action in the matter, and recommended the cancellation of his entry. In view of the facts that the entry had been held for cancellation in 1874, and that McLean had allowed the statutory limit to expire without making proof required, and had also failed to establish his claim after due notice, said entry was canceled in this office Sept. 11, 1879, and you were so informed by letter of that date.

As shown by the certificate of the probate judge of Lewis and Clarke county, M. T., McLean died Aug. 20, 1882.

Mrs. McLean claims that her husband's entry was confirmed by section one (1) of act of April 21, 1876; that in view of said fact the cancellation of said entry was error; and that as his widow, she has the right to purchase under section 2 of the act of June 15, 1880, whereby payment of the piece of land is made equivalent to proof of compliance with the provisions of the homestead laws.

Sec. 1 of the act of April 21, 1876, provides that pre-emption and homestead entries of the public lands, made in good faith by actual settlers upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts, shall be confirmed and patents for the same shall be issued to the party entitled thereto.

38 Section 2 of the act of June 15, 1880, provides that persons that have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of having so entered for homestead may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said land by paying the Government price therefor with credit for the amount already paid, with a further provision that this shall in no way interfere with the rights or claims of others who may have subsequently entered said lands under the homestead laws.

Counsel for the railroad company contends that the act of 1876 confirms only such entries wherein the homestead laws have been complied with and proper proofs thereof have been made; that McLean never invoked the relief provided by said act, but allowed his claim to expire, and suffered it to be canceled, as heretofore stated, more than three years after the passage of said act, without

protest; that as the land had been withdrawn by legislative enactment before the entry was made, upon cancellation of the same the land became subject to the grant and the matter had become *res adjudicate* and other rights had attached at the time the act of 1880 became a law; and that the right of the company is held not only under the legislative withdrawal of 1872, but also under the definite location of its road in July, 1882.

This office has already decided that upon the death of a homestead entryman the right to purchase under the act of 1880 descended to his widow. (See — to R. and R., Taylor's Falls, Minn.,

39 May 21, 1883, 10 C. L. O., 90. Also that cancellation of an entry is no bar to purchase under said act. (*Ex parte* Mitchell, 10 C. L. O., 36.)

It may be that the pre-emption claims herein mentioned subsisting at the date of the filing the map of the general route were sufficient to except the land from the withdrawal, which it is now held took effect upon such filing, but beyond the mere fact that they were then of record there is no evidence of the validity of such claims.

The object of the act of 1876 was to afford relief to persons who without a knowledge of the withdrawal had made entries on land prior to receipt of notice of such withdrawal at the local office since, as in this case, where there was a prior legislative withdrawal, such entries could not have been perfected without such legislation. It is true the act required the proof of the compliance with the provisions of the homestead law should be made.

Upon the passage of the act of 1880, however, it became optional with a homestead entryman to make proof of such compliance or to purchase the land, and such payment is accepted in lieu of proof. (A. G. and W. U. T. Co. *vs.* Martin, 10 C. L. O., 329.)

McLean's homestead entry is clearly within the terms of the act of 1880, in lieu of making proof of the compliance with the provisions of the homestead laws as to residences and cultivation was not affected by the definite location of the company's road is, in my opinion, settled by the action of this office and the department in the case of O'Dillon B. Whitford against said company. In that

case Whitford had a homestead entry subsisting which excepted the land from the legislative withdrawal on general route. His entry was canceled in 1879 for failure to make proof within statutory period.

After the road had been definitely located he was allowed to purchase under the act of 1880. Dec. 1, 1883, his cash entry was considered in this office and held for approval for patent upon the ground that his homestead excepted the land from the withdrawal on general route and from the grant. This decision was affirmed by the honorable acting Secretary of the Interior on appeal, Jan. 7, 1885.

In the case at the bar the act of 1876 took the land out of the withdrawal on the general route, and prior to definite location of the road, the act of 1880 conferred upon the entryman a right to pay for the same in place of making proof as required prior to that

time, which right, under the decision above cited, was not affected by the definite location of the road, and, upon his death, descended to his widow.

Mrs. McLean's cash entry of the land in question is accordingly held for approval for patent, subject to appeal by the railroad company within sixty days.

Notice of this action will be given the parties in interest through their resident attorneys by letters of even date herewith.

Very respectfully,

N. C. MFARLAND,
Commissioner.

41

DEPARTMENT OF THE INTERIOR,
WASHINGTON, March 28th, 1887.

NORTHERN PACIFIC R. R. Co. }
vs.
MARIA MCLEAN. }

Entry within Limits of Land Grant Prior to Notice of Withdrawal.

The Commissioner of the Land Office.

SIR: William McLean made homestead entry of the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, sec. 17, T. 10 N., R. three west, Helena, Montana, May 3, 1872. This tract is within the limits of the withdrawal of the odd-numbered sections for the benefit of the Northern Pacific Railroad Company, upon map of general route filed February 21st, 1872, the withdrawal was made February 21st, 1872, notice of which was received at the local office May 6th, 1872. It is also within the forty-mile limit of said road, as fixed by the map of definite location, filed July 6, 1882.

The letter of withdrawal directed that it should take effect from the date of its receipt at the local office. Subsequently the Secretary decided that said withdrawal took effect upon the filing and acceptance of the map of the general route, whereupon on December 1st, 1873, McLean's entry was held for cancellation, subject to appeal, but no appeal was taken from said decision.

42 July 3, 1879, the local officers reported that McLean had been notified, pursuant to office circular of December 20, 1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with the law within the statutory period, and failing to respond to such notice, his entry was canceled September 11, 1879, and no appeal was taken from that action.

McLean died the 20th day of August, 1882, and Maria McLean, his widow, on March 15, 1883, made application to purchase said tract under the act of June 15th, 1880, upon the ground that her husband's entry being confirmed by the first section of the act of April 21, 1876 (19 Stat., No. 35), that payment for the land under the act of June 15, 1880, is equivalent to proof of compliance with the provisions of the homestead laws.

Your office awarded to Mrs. McLean the right to purchase, holding that under the act of June 15, 1880, it became optional with

the homestead entrymen, either to make proof of the compliance with the provisions of the homestead law, or to purchase the land, and that payment for the land is accepted in lieu of such proof, from which decision the company appealed. At the date of the withdrawal this tract was covered by the following pre-emption filings:

A. J. Wetter, for the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, with other tracts, May 13, 1868, alleging settlement same day.

Wm. M. Scott, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, with other tracts, Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, and again amended Oct. 14, 1872, to No. 2807 including said tract.

43 Jerome S. Glick, S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, with other tracts, Nov. 27, 1868, alleging settlement same day.

Robert C. Wallace, S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, with other tracts, Dec. 13, 1869, alleging settlement same day.

Prior to the act of July 14, 1870, no time had been prescribed within which pre-emptors were required to make proof and payment for their claims or unoffered lands, but that act provided that nothing in the act of March 27, 1854, "shall be construed to relieve settlers on lands reserved for railroad purposes from the obligation to file the proper notices of their claims, as in other cases, and all claimants of pre-emption right shall hereafter, when no shorter period of time is now prescribed by law, make proof and payment for the land claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

The act of March 3, 1871, extended the time within which proof and payment shall be made one year; and this provision has since been enforced and was subsequently incorporated in the Revised Statutes as section 2267, which provides that all claimants of pre-emption rights upon unoffered lands shall make proof and payment for the land claimed within thirty months after the date prescribed for filing their declaratory notices has expired.

It therefore appears that at the date of the withdrawal a pre-emption claim to the land in controversy was subsisting capable of being perfected, and hence this tract of land not being perfected by the withdrawal for the benefit of the road, and the homestead entry of McLean was not controlled by the act of April 21, 1876.

44 In the case of *The Northern Pacific Railroad Company versus Burt* (3 L. D., 490), the department held that the widow of an entryman had the right to purchase under the act of June 15, 1880, although the entry had been canceled for failure to make proof within the statutory period prior to the definite location of the road, and although the application to purchase was made subsequent thereto, following a long line of departmental decisions. See, also, *Gilbert versus Spearing*, 4 L. D., 463; *Holmes versus Northern Pacific Railroad Company*, 5 L. D., 333.

Applying the rule to the case at bar, Mrs. McLean should be allowed to purchase, and for this reason I affirm your decision, and herewith transmit the papers.

Very respectfully,

A. L. MULDROW, *Act'g Sec.*

XXII.

That afterward, to wit, June 17, 1887, letters patent of the United States were issued to said Maria McLean, in the usual form, describing and purporting to convey to said Maria McLean, as widow of said William McLean, deceased, the west half of northwest quarter (N. W. $\frac{1}{2}$ N. W. $\frac{1}{4}$), southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$), and the southwest quarter of the northeast quarter (S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of sections seventeen (17), township ten (10) north, of range three (3) west, P. M. Montana. That said patent is sufficient in form and in all respects to convey, and did convey, the title to said described lands to said Maria McLean, now the defendant
 45 Maria Amacker, unless the title to said land had previously vested in the Northern Pacific Railroad Company by virtue of said act of July 2, 1864.

XXIII.

That the said south half of the northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of said section seventeen (17), township ten (10) north, of range three (3) west, the land here in controversy, was, at the commencement of this action, of the value of twenty thousand dollars (\$20,000), and is now worth over five thousand dollars (\$5,000.00). That the said defendant Maria Amickar is in possession of the premises in controversy as grantee under the patent from the United States issued to her therefor; and that the other defendants are in possession of said premises under and by virtue of conveyances from said Maria McLean (now Maria Amickar), and that the title of all the defendants is of the same quality.

XXIV.

That after the death of said William McLean, as hereinbefore set forth, his widow, Maria McLean, married the defendant, John J. Amickar.

F. M. DUDLEY,
 CULLEN & TOOLE,
Solicitors for Complainant.
 T. C. BACH AND
 MASSENA BULLARD,
Solicitors for Defendants.

(Endorsed:) Title of court and cause. Agreed statement of facts. Filed and entered Dec. 18, 1895. Geo. W. Sproule, clerk.

46 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs. }

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants. }

Findings of Fact and Conclusions of Law.

Be it remembered that this cause came on regularly for trial on the 19th day of December, 1895, before the court sitting without a jury, a trial by jury having been expressly waived by the parties thereto before the trial was commenced, and the said cause having been submitted upon an agreed statement of facts, which said agreed statement is in writing and embraced in the stipulation between the parties on file herein, and having been argued by counsel for both plaintiff and the defendants the same was by the court taken under advisement, and now upon this 3rd day of March, 1897, one of the days of the November term of said court, the court finding the facts herein as set forth in said agreed statement and stipulation, and as conclusion of law from said facts finds that the plaintiff is not and was not at any of the times mentioned in the complaint the owner of or entitled to the possession of the south half of the northwest quarter of section seventeen (17), in township ten (10) north, of range three (3) west, of the principal meridian of Montana, or any part thereof and that the defendants are entitled to the possession of said lands, and that the defendants are accordingly entitled to judgment and costs herein.

Dated March the 3rd, 1897.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Finding of facts and conclusion of law. Filed March 3, 1897. Geo. W. Sproule, clerk.

48 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs. }

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants. }

Judgment.

This cause came on regularly for trial on the 19th day of December, 1895, F. M. Dudley, Esq., and Messrs. Cullen and Toole appeared as counsel for plaintiff and Thomas C. Bach, Esq., and

Massena Bullard, Esq., appeared as counsel for defendants. A trial by jury having been expressly waived by the counsel for the respective parties the cause was tried before the court sitting without a jury, whereupon by written stipulation of the parties, the 49 said cause was submitted to the court for consideration and decision upon an agreed statement of facts, which stipulation embracing said facts is on file in said action, and after due deliberation thereon the court delivers its findings and decision in writing which is filed and ordered that judgment be entered in accordance therewith:

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that The Northern Pacific Railroad Company, the plaintiff, take nothing herein, and the defendants Maria Amicker, John J. Amicker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, and Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert do have and recover of and from The Northern Pacific Railroad Company, the plaintiff, the said defendants' costs and disbursements incurred in this action, amounting to the sum of — dollars.

Judgment entered March 3rd, 1897.

GEORGE W. SPROULE, *Clerk.*

A true copy.

Attest:

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) Title of court and cause. Judgment. Filed and entered March 3rd, 1897. Geo. W. Sproule, clerk.

50 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY }
versus } No. 140.
MARIA AMICKER ET AL. }

Clerk's Certificate to Judgment-roll.

George W. Sproule, clerk of the circuit court of the United States, for the ninth judicial circuit, district of Montana, do hereby certify that foregoing papers heretofore annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court this 3rd day of March, 1897.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) Title of court and cause. Judgment-roll. Filed and entered March 3rd, 1897.

And thereafter, to wit, on the 15th day of June, 1897, the plaintiff herein filed its assignment of errors herein; which said assignment of errors is in words and figures as follows, to wit:

51 In the United States Circuit Court for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant, }
 v.s. }
 MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. }
 Howell, George Gotthardt, Walter H. Little, Alexander J. }
 Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert }
 B. Reed, and George Dibert, Defendants. }

Assignment of Errors.

Comes now the above-named complainant and assigns error on the record in the above-entitled case as follows, to wit:

I.

The court failed to hold that the land described in the complaint was reserved for the benefit of the Northern Pacific Railroad Company from and after February 21, 1872.

II.

52 The court failed to hold that the lands in controversy were public lands, not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption or other rights at the date that the said Northern Pacific railroad coterminous with said lands was definitely fixed by the filing of a plat thereof in the office of the Commissioner of the General Land Office.

III.

The judgment entered is not supported by the facts found.

IV.

The entry of judgment for the defendants and against the plaintiff.

Wherefore, plaintiff prays that the judgment rendered in this cause may be reversed and set aside, and held for naught.

WM. WALLACE, JR.,
 F. M. DUDLEY,
Attorneys for Plaintiff.

(Endorsed:) Title of court and cause. Assignment of errors. Filed June 15, 1897. Geo. W. Sproule, clerk.

53 And on said 15th day of June, 1897, the petition of said Northern Pacific Railroad Company, plaintiff, for a writ of error was duly filed herein in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Petition for Writ of Error.

And now comes The Northern Pacific Railroad Company, plaintiff herein, and says that on the 3rd day of March, 1897, this court entered judgment herein in favor of the defendants and against this plaintiff in which judgment and the proceedings had thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the ninth circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said circuit court of appeals.

F. M. DUDLEY AND
WM. WALLACE, JR.,
Attorneys for the Plaintiff.

Let the writ of error issue as herein prayed.

Dated June 15, 1897.

HIRAM KNOWLES,
U. S. District Judge.

(Endorsed:) Title of court and cause. Petition for writ of error and order. Filed and entered June 15, 1897. Geo. W. Sproule, clerk.

55 And on said 15th day of June, 1897, the bond on writ of error was duly approved and filed, which said bond is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.

MARIA AMACKER, JOHN J. AMACKER, Her Husband; GEORGE S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Bond on Writ of Error.

Know all men by these presents, that we, Northern Pacific Railroad Company, as principal and E. W. Williams, and A. D. Edgar,

as sureties, are held and firmly bound unto the above-named defendants in the sum of \$300.00, three hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, and each and every of them jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1897.

Whereas, the above-named plaintiff, Northern Pacific Railroad Company, has sued out a writ of error in the United States circuit court of appeals for the ninth circuit, to reverse the judgment rendered in the above-entitled action on the 3rd day of March, A. D. 1897.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff, Northern Pacific Railroad Company, shall prosecute said writ of error to effect and answer all damages and costs, if it fails to make said writ of error good, then this obligation to be void, otherwise the same shall be and remain in full force, virtue and effect.

NORTHERN PACIFIC RAIL-
ROAD COMPANY,
By WM. WALLACE, JR.,
Its Agent and Atty.
A. D. EDGAR. [SEAL]
E. W. WILLIAMS. [SEAL]

57 UNITED STATES OF AMERICA, { ss :
District of Montana,

E. W. Williams and A. D. Edgar, being duly sworn, each for himself deposes and says, that he is a resident of the State of Montana, and one of the sureties to the foregoing bond; that he is worth the sum specified therein as the penalty thereof over and above his just debts and liabilities and property by law exempt from execution.

A. D. EDGAR.
E. W. WILLIAMS.

Subscribed and sworn to before me this 15th day of June, 1897.

HARRY YEAGER,
Notary Public Lewis and Clarke County, State of Montana.

I hereby approve the within bond and sureties.

HIRAM KNOWLES, Judge.

[Endorsed:] Title of court and cause. Bond. Filed June 15, 1897. Geo. W. Sproule, clerk.

58 And on said day a writ of error and citation were duly issued, served and filed which are hereto annexed:

Citation.

UNITED STATES OF AMERICA, ss:

To Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed, and George Dibert, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held in the city of San Francisco and the State of California, on the 13th day of July, 1897, pursuant to a writ of error filed in the clerk's office of the circuit court of the ninth circuit of the United States for the district of Montana, wherein Northern Pacific Railroad Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the said judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, judge of the district court of the United States, district of Montana, this 15th day of June, A. D. 1897, and of the Independence of the United States the one hundred and twentieth.

HIRAM KNOWLES, *Judge.*

59 Service of the above citation is hereby admitted and receipt of copy acknowledged this 15th day of June, 1897.

MASSENA BULLARD,
Attorney for Defendants and Defendants in Error.

(Endorsed:) Citation. Filed June 15, 1897. Geo. W. Sproule, clerk.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States, ninth circuit, district of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the said circuit court, before you, between Northern Pacific Railroad Company, plaintiff, and Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed and Geo. Dibert, defendants, a manifest error hath happened, to the great damage of the said plaintiff, and plaintiff in error, Northern Pacific Railroad Company, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then,

60 under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States circuit court of appeals for the

ninth circuit, together with this writ, so that you have the same at San Francisco, California, on the 13th day of July, 1897, next, in the said United States circuit court of appeals for the ninth circuit, to be then and there held; that, the record and proceedings aforesaid being inspected, the said United States circuit court of appeals for the ninth circuit, may cause to be done therein to correct that error, what of right, according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of June, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twentieth.

Attest:

GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed.

HIRAM KNOWLES, *Judge.*

Service of the above writ of error is hereby admitted and receipt of copy acknowledged this 15th day of June, 1897.

MASSENA BULLARD,

Attorney for Defendants and Defendants in Error.

(Endorsed:) Writ of error. Filed June 15, 1897. Geo. W. Sproule, clerk.

61 *Return to Writ of Error.*

The answer of the judges of the circuit court of the United States for the district of Montana to the foregoing writ.

The records and proceedings whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals for the ninth circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.]

GEO. W. SPROULE, *Clerk.*

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, }
District of Montana, } ss:

I, George W. Sproule, clerk of the United States circuit court, ninth circuit, district of Montana, do hereby certify that the foregoing volume, consisting of 52 pages, numbered consecutively from 1 to 52 inclusive, is a true and correct and complete transcript of the pleadings, process, orders, judgment, and all proceedings had in said cause and of the whole thereof as appears from the

62 original files and records in said cause in said court, and I further certify that I have annexed to and included within said paging the original writ of error and citation, together with the proof of service thereof.

I further certify that the cost of said transcript is the sum of \$16.10, and that the same has been paid by plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of said U. S. circuit court at Helena, in said district of Montana, this 5th day of July, A. D. 1897.

[SEAL.]

GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 386. United States circuit court of appeals for the ninth circuit. Northern Pacific Railroad Company, plaintiff in error, *v.* Maria Amacker, J. J. Amacker (her husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed, and Geo. Dibert, defendants in error. Transcript of record. Error to the United States circuit court for the district of Montana. Filed July 10, 1897. F. D. Monckton, clerk.

63 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* AMACKER and Others, Defendants in Error. } No. 386.

Before Gilbert, Ross, and Morrow, circuit judges.

The COURT: This case has once before been before this court, and is reported in 58 Fed. Rep., 850, where the judgment of the lower court was reversed and the cause remanded for a new trial. The record in the present case shows the facts to be substantially the same as those appearing on the former hearing, and the judgment below being in accordance with the ruling of this court when the case was then here must be affirmed. The former decision has become the law of the case.

Judgment affirmed.

(Endorsed:) Opinion. Filed February 7th, 1898. F. D. Monckton, clerk.

64 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1898.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* MARIA AMACKER, J. J. AMACKER (Her Husband), G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed, and Geo. Dibert, Defendants in Error. } No. 386.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) Judgment. Filed Feb. 7, 1898. F. D. Monckton, clerk.

65 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }
vs. }
MARIA AMACKER, J. J. AMACKER (Her Husband), G. S. HOWELL, }
G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. }
Jordan, H. B. Reed, and Geo. Dibert, Defendants in Error. }

Know all men by these presents that we, Northern Pacific Railroad Company, as principal, and Charles S. Mellen and Jule M. Hannaford, as sureties, are held and firmly bound unto the above-named defendants in the sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns and each and every of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 25th day of February, 1898.

Whereas the above-named Northern Pacific Railroad Company has sued out a writ of error in the Supreme Court of the United States to reverse the judgment of the United States circuit court of appeals for the ninth circuit, rendered in the above-entitled action:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make said writ of error good, then this obligation to 66 be void; otherwise the same shall be and remain in full force, virtue, and effect.

NORTHERN PACIFIC RAILROAD
COMPANY,
By C. S. MELLEN, President.
CHARLES S. MELLEN. [SEAL.]
JULE M. HANNAFORD [SEAL.]

STATE OF MINNESOTA, }
Ramsey County, } ss:

Charles S. Mellen and Jule M. Hannaford, being duly sworn, each for himself deposes and says he is a resident of the State of Minnesota and one of the sureties on the foregoing bond; that he is worth the sum specified therein as the penalty thereof over and above his just debts and liabilities and property by law exempt from execution.

CHARLES S. MELLEN.
JULE M. HANNAFORD.

Subscribed and sworn to before me the 25th day of February, 1898.

[SEAL.]

H. L. DONOHOWER,
Notary Public, Ramsey County, Minnesota.

I hereby approve within bond.

JOSEPH MCKENNA,

Associate Justice of the Supreme Court of the United States.

(Endorsed:) Bond on writ of error to U. S. Supreme Court. Filed Mar. 16, 1898. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

67 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in
Error,
v.
MARIAM AMACKER ET AL., Defendants in Error. } No. 386.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-six pages, numbered from one to sixty-six, both inclusive, to be a true copy of the record and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain of record in said circuit court of appeals, and that the same constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 17th day of March, A. D. 1898.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk United States Circuit Court of Appeals
for the Ninth Circuit,*
By MEREDITH SAWYER,
Deputy Clerk.

68 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Maria Amacker, J. J. Amacker, her husband; G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank, J. Jordan, H. B. Reed, and George Dibert, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties

aforsaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States. Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

Due service of the above writ of error is hereby admitted & receipt of copy of same acknowledged this — day of March, 1898.

Atty for Maria Amacker and J. J. Amacker, Her Husband.

69 [Endorsed :] Dock. No. 386. United States circuit court of appeals for the ninth circuit. Northern Pacific Railroad Company, plaintiff in error, v. Maria Amacker et al., defendants in error. Writ of error. Filed Mar. 16, 1898. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the date and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court :

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk United States Circuit Court of Appeals
for the Ninth Circuit,*
By MEREDITH SAWYER,
Deputy Clerk.

70 UNITED STATES OF AMERICA, ^{ss}:

To Maria Amacker, J. J. Amacker, her husband; G. S. Howell
G. Gotthart, W. H. Little, A. J. Steele, F. H. Ringe, J. Blank,
J. Jordan, H. B. Reed, and George Dibert, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this fourth day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

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STATE OF MONTANA,
District of Montana, County of Lewis & Clarke, } ss :

On this 9th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Harry Yaeger before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Massena Bullard; that he knows the said Massena Bullard, and that he is the same person who signed the admission of service of the citation filed in this case in the circuit court of the ninth circuit of the United States on June 15th, 1897, which admission of service he there signed as attorney for all defendants and defendants in error in this action.

HARRY YAEGER.

Sworn to and subscribed the ninth day of March, A. D. 1898.

JOHN K. SCOTT,
Notary Public, Lewis & Clarke County, Montana.

[Notarial Seal of Jno. K. Scott, Lewis & Clarke County, Montana.]

Due service of the above & within citation is hereby admitted and receipt of copy of same acknowledged this 9th day of March, 1898.

MASSENA BULLARD,
Att'y for Maria Amacker and J. J. Amac-er, Her Husband.

[Endorsed:] Dock. No. 386. United States circuit court of appeals for the ninth circuit. Northern Pacific Railroad Company, plaintiff in error, *v.* Maria Amacker *et al.*, defendants in error. Citation. Filed Mar. 16, 1898. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

MARIA AMACKER ET AL.

UNITED STATES OF AMERICA,
District of Montana, County of Lewis & Clarke, } ss:

Wm. Wallace, Jr., being duly sworn, says: On the 28th day of March, 1898, I delivered a true copy of the citation in cause No. 386, to which this affidavit is attached, to Thomas C. Bach. I know said Bach and that he is the same person who signed the original pleadings in this action as attorney for all defendants, save defendants Maria Amacher and J. J. Amacher, her husband, and that he was attorney of all of said defendants at the time of the rendition of the judgment of March 3d, 1897. Farther affiant saith not.

WM. WALLACE, JR.

Subscribed and sworn to before me this 28th day of March, 1898.

[Notarial Seal of Harry Yaeger, Lewis & Clarke County, Montana.]

HARRY YAEGER,
Notary Public, Lewis and Clarke County, Montana.

Endorsed on cover: Case No. 16,855. U. S. C. C. of appeals, 9th circuit. Term No., 282. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Maria Amacker, J. J. Amacker, her husband; G. S. Howell, G. Gotthart, W. H. Little, A. J. Steele, *et al.* Filed April 22, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 282.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.

MARIA AMACKER, J. J. AMACKER, HER HUSBAND, G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED AND GEORGE DIBERT.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

This is an action in the nature of ejectment brought in the Circuit Court of the United States for Montana by plaintiff in error to recover from the defendants the possession of the south half of the northwest quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$) of section seventeen (17), township ten (10) north, range three (3) west of the principal meridian of Montana.

Plaintiff in error claims title under an act of congress approved July 2, 1864, entitled "An

act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast, by the northern route." (13 Stat. 265.)

The provisions of this act are familiar to the court, having been before it many times, and need not be set out at length.

The company on February 21, 1872, fixed that portion of its general route opposite to the land here involved by filing a plat of general route in the office of the Commissioner of the General Land Office. On April 22, 1872, the Commissioner of the General Land Office by direction of the Secretary of the Interior transmitted to the register and receiver of the United States land office at Helena, Montana, within which district said land was located, a diagram showing that portion of the line of general route of the railroad extending through said land district, and directed them to withhold from sale or location, pre-emption or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands within the limits of forty miles of such general route. This diagram and order were received and filed in said land office on May 6, 1872.

Prior thereto, and on October 5, 1868, one William M. Scott settled upon said tract and filed therefor in said district land office a pre-emption declaratory statement alleging settlement thereon, and in the following year built a house and moved into it. In the fall of that year

(1869) he abandoned the land, moved to Helena and continued to reside there for many years working at his trade and then took up his residence in Butte and never returned to the land. On October 14, 1872, Scott filed in the district land office his amended preemption declaratory statement wholly excluding the land in controversy and substituting other land. (Record page 13, paragraph XIV.) On July 6, 1882, the railroad company definitely fixed the line of its road opposite to and within forty miles of this land by filing a plat of definite location in the office of the Commissioner of the General Land Office. Thereafter the road was duly completed.

Between the date of the fixing of the line of general route (February 21, 1872) and the date when notice of the withdrawal of lands thereon (May 6, 1872) was received at the district land office, one William McLean, on May 3, 1872, made homestead entry of said land. It appears that in the fall of 1872, McLean built a shanty on the premises and spent his nights there until the spring of 1873, when he ceased to reside upon the premises. (Record page 13, paragraph XV.) On December 1, 1874, the Commissioner of the General Land Office wrote to the register and receiver informing them that the homestead entry of McLean was held for cancellation because made subsequent to the reservation of said land for the railroad company on general route. On July 3, 1879, the register and receiver wrote to the Commissioner that on June

2, 1879, they had notified McLean in accordance with land office circular of December 20, 1873, to show cause within thirty days why his entry should not be cancelled for failure to make proof and payment within the statutory period; that McLean had failed to take any action in the premises and that they therefore recommended the cancellation of the entry. By his letter of September 11, 1879, the Commissioner informed the register and receiver that as a consequence of McLean's default his said homestead entry was thereby cancelled. The railroad was as shown definitely located July 6, 1882, and McLean died in August, 1882; on March 15, 1883, his widow, Maria McLean (now Maria Amacker), one of the defendants in error, applied to enter and purchase under the provisions of the act of congress of June 15, 1880 (21 U. S. Stat. 237.)

This application was contested by the railroad company and in such contest the Commissioner, on February 20, 1885, rendered a decision allowing the application and held that the tract was excepted from the grant to the company by reason of the existence of McLean's right to purchase it under the act of June 15, 1880. On appeal this decision was affirmed by the Secretary on March 28, 1887, and on June 17, 1887, a patent was issued to Mrs. McLean. The other defendants claim title through her. The land is non-mineral and is worth over \$20,000,00.

It was held by the Circuit Court in the opinion by Judge Knowles reported in 53 Federal Re-

porter, page 48, that the land was free from claims or rights at the date of definite location and that it passed by the grant to the railroad company. It was held by the Circuit Court of Appeals (opinion by Judge Gilbert, 15 U. S. A. 279); (a) that the Scott preemption declaratory statement did not except the lands from the grant, because its amendment, wholly excluding therefrom the lands in controversy and fixing the preemption upon other lands, was an effectual cancellation of the former declaratory statement so far as the land in controversy is concerned (p. 283-4); (b) that the act of April 21, 1876, protected and revived the cancelled homestead entry of McLean, and that the act of July 15, 1880, conferred upon McLean and his successors such a right to purchase, *as constituted a claim attached to the land operating to take it out of the railroad grant.*

ASSIGNMENT OF ERRORS.

The plaintiff in error now assigns the following errors in the ruling and judgment of the Circuit Court of Appeals:

First. The court erred in holding that the cancelled homestead entry of McLean was revived and protected by the act of April 21, 1876.

Second. The court erred in holding that the act of July 15, 1880, attached any right or claim

to the land which would take it out of the railroad grant.

Third. The court erred in holding that the land was excepted from the grant to the railroad company and in rendering judgment against the plaintiff in error.

ARGUMENT.

McLean's Entry.

The homestead entry of McLean was allowed on May 3, 1872, between the date of the filing of the map of general route and the date when the notice of such filing was received at the local office. The allowance of the entry at that time is sustained by the Circuit Court of Appeals by virtue of the provisions of the act of April 21, 1876 (19 Stat. 35, Sec. 1), which provides as follows:

“Sec. 1: That all preemption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, of the district in which such lands are situated, or after their restoration to market by order of the general land office, and where the preemption and homestead laws have been complied with, and proper

proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

It may be conceded that this act confirms all such entries as are described therein, made upon lands within the limits of a railroad grant, between the date of an executive withdrawal and the date when notice of such withdrawal is received at the local office. But the provision of the act is express that the entries confirmed are those alone where the preemption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts. No such facts existed in this case. McLean resided on the premises only during the winter of 1872-1873 when he abandoned the land. The record shows that his entry was held for cancellation within 19 months after it was made because it had been allowed subsequent to the reservation on general route, and that it was finally cancelled on September 11, 1879, for failure to comply with the homestead law. It is manifest that the act of April 21, 1876, was passed for the purpose of confirming entries made before the date of withdrawal and the date when notice of such withdrawal was received at the local office, so far at least as these withdrawals were executive and not legislative. But the provisions of the act are further confined by its express terms to those cases where the homestead and preemption laws have been com-

plied with and proof of this fact is made. But in this case the record shows affirmatively that McLean did *not* comply with the law and no pretense is made of any proof of such compliance so that his case is outside both the terms and the spirit of the act.

Purchase Under Act of June 15, 1880.

The railroad was definitely located June 6, 1882. McLean died in August, 1882, and in 1883 his widow applied to purchase under section 2 of the act of June 15, 1880, (21 Stat. 237), and her application was allowed. Upon her application so made the patent was issued. The allowance of her purchase was justified by the court below and by the department on the ground that at the date of definite location McLean had the right to purchase under the act of June 15, 1880, and it was held that such right to purchase existing at that date operated to except the land from the grant.

Section 2 of the act provides as follows:

“That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre; and the amount heretofore paid the government upon said

lands shall be taken as part payment of said price; provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

It is not pretended that the act places the lands subject to its provisions in the category of reserved lands or in any manner withdraws them from the public domain. They still remain "public lands" in the fullest sense of that term subject to any and every lawful disposition. They may be preempted or homesteaded by others, or may be sold by the United States, or granted away, or placed in reservation. Therefore it would seem that they would necessarily pass under the Congressional grant just as other public lands to which no right had *attached*. The fact that an individual may have the inchoate and unexercised option to purchase does not withdraw them from the "public lands." Any reasoning that would lead to such a conclusion would reach the absurdity of holding *all* public lands withdrawn from the grant; for every acre of public land is subject to the right of preemption or homestead, or acquisition under some law by any citizen of the United States possessing the requisite qualifications. The naked and unexercised option to purchase cannot take lands out of the class of public lands or out from under the Congressional grant. To except them from the grant requires the *attachment* of some right.

As Mr. Justice Miller delivering the opinion of this court said in the case of *Kansas Pacific Railway vs Dunmeyer*, 113 U. S. 629, 644:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language has been repeated, re-affirmed, emphasized and put in various forms in the subsequent decisions of this court following the Dunmeyer case. Mr. Justice Brewer in the opinion of the Court in *Northern Pacific Railroad Company vs Colburn*, 164 U. S. 383, 386-7, quotes several of the decisions and holds that this language is applicable to the Northern Pacific grant.

The right to purchase the land, conceding that McLean had any right, was a mere privilege or option of which he never availed himself and of which his successors did not seek to avail themselves until three years after the act of 1880 was passed and until the year following the definite location of the railroad and the attachment of the railroad grant. The land was clearly public land July 6, 1882, when the line of road was definitely located and passed under the grant. See opinion of Judge Knowles in this case 53 Federal Reporter 54-58.

The spirit of the law is found in the words of Mr. Herbert of Alabama who introduced the bill. In the debate on the subject he said:

"The land is not disposed of until the persons to whom the privilege is given to buy the lands shall actually go forward and buy them. * * * Every foot of public land that belongs to the United States now, will belong to the United States after the passage of this bill. * * * It merely lays down rules and prescribes regulations, under which lands can be purchased, and then it describes the effect of the purchase of the lands; that is all. All the lands that belong to the United States will belong to it after the passage of this bill, and if persons do not see proper to go forward and enter lands under the bill, all the lands will continue to belong to the government as it does now."

10. Congressional Record, 46th Congress, Second Session, 123-124.

In *Nathaniel Banks*, 8 L. D. 532, Secretary Noble says:

"It seems to be claimed by counsel in the motion for review, that a purchase under the act of 1880 is not a new or original entry, but a re-instatement and consummation of the homestead entry, operating by relation from the date of such entry. The act, however, by protecting 'all vested rights that might intervene prior to application to purchase' (George S. Bishop, 1 L. D. 69), expressly deprives the purchase of any operation by relation as to such rights, and there is nothing in the language or reason of the law, to sustain the position contended for, or to indicate that anything more was intended than the conferring upon a particular class of persons the right of private

cash entry of certain lands, operative from the date of such entry."

See also:

U. S. vs. Perkins, 44 Fed. Rep. 671;
Mulloy vs. Cook (Ala.) 10 So. Rep. 349.

In the next place it is very doubtful if the act of 1880 operates to give the widow any right. The language of the act grants the right to the party making the entry or the transferee of such party by *bona fide* instrument in writing. It does not in terms include the widow or children of the entryman, while sections 2291, 2292 and 2307 of the Revised Statutes relating to homestead entries contain special provision in favor of widow and children, as did also the act of September 7, 1850, known as the "Oregon Donation Act," 9 Stats. 496, 499. Not only therefore is the widow not mentioned in *this* act, but we find in other acts of Congress touching the same subject the widow is specifically named as entitled to rights originally vested in her husband. The inference seems to us clear that Congress did not intend to grant to others than the homesteader himself, or transferee holding under him by instrument in writing, any rights under the act in question. This view was indicated in the opinion of Mr. Justice Brewer in *Gallihier vs. Cadwell*, 145 U. S. 368.

The last suggestion is met by the learned Circuit Court of Appeals, by saying it is unnecessary to determine that question in this case, be-

cause McLean was still living when the map of definite location was filed and the railroad company's rights were fixed. But this argument of the court begs the question and rests back for support on the proposition that McLean's rights were vested by mere passage of the law and without any purchase or application made by him. The question is in the case and necessary to be decided unless it can be held that the mere passage of the act without any application to purchase under it *attached* a right in the land in favor of McLean.

The Company's Title.

It appears from the record that on July 2, 1864, the date of the grant, the land was public land and that when the company's rights attached the Scott preemption declaratory statement was an "expired filing" and in fact cancelled by the filing of an amended declaratory statement from which this land was omitted. This was the ruling both of the trial court and of the court of appeals.

The latest ruling of the Department is to the effect that a filing is extinguished by lapse of the statutory period prescribed for making proof and payment.

Union Pacific Ry. Co., vs Fisher, 28 L. D. 75
(Advance Sheets).

And the making of another filing excluding the land covered by one already made extin-

guishes the first.

Sanborn vs Knight, 75 N. W. Rep. 1009 (Wisconsin).

Neilson vs Railroad Company, 9 L. D. 402.

And the entry of McLean whether properly or improperly allowed was cancelled and the land abandoned by McLean before the date of the definite location of the road. The land was therefor public land, free from claims and rights, at the date of definite location and the legal title passed to the company on that date.

St. P. & P. R. R. Co. vs N. P. R. R. Co.,
139 U. S., 1, 5;

Deseret Salt Co. vs Tarpey, 142 U. S. 247.

The title thus acquired is the legal title as distinguished from the equitable title, and is sufficient to sustain an action in ejectment.

Deseret Salt Co. vs Tarpey, supra.

The patent issued being for land the title to which had already passed from the government was void. It did not operate to convey the title, for the government had no title to convey. This fact may be shown in an action of ejectment equally as well as in an action in equity, and being established, the patent is no bar to the recovery by the holder of the true title.

Doolan vs Carr, 125 U. S. 624;

Burfenning vs C. St. P. M. & O. Ry., 163 U. S. 321.

We submit that the judgment of Circuit Court of Appeals should be reversed.

C. W. BUNN AND
JAMES B. KERR,
Counsel for Plaintiff in Error.

Syllabus.

NORTHERN PACIFIC RAILROAD COMPANY *v.*
AMACKER.ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 61. Argued October 24, 1899. — Decided January 8, 1900.

By the act of July 2, 1864, c. 217, a grant of public land was made to the Northern Pacific Railroad Company to aid in the construction of its railroad and telegraph line. A small tract of this grant is the subject of this action of ejectment. In October, 1868, one Scott made a preëmption declaratory statement regarding this tract, and settled upon it in 1869, but abandoned it in the same year and never returned. In October, 1872, he filed an amended statement excluding the land in controversy. On February 21, 1872, the company filed its map of general route through Montana. On the 22d of April, 1872, the Commissioner of the General Land Office, by direction of the Secretary of the Interior transmitted to the local land office in Montana a diagram showing the location of the road in the district in which the subject of controversy was situated, and directed the withholding from sale or location, preëmption or homestead entry, of the odd-numbered sections within forty miles of the general route of the railroad. On May 3, 1872, McLean, a citizen of the United States, duly qualified to enter land, made a homestead entry of the tract in controversy in this case. On May 6, 1872, the diagram and order sent April 22 were received at the local land office and filed there. In the autumn of 1872 McLean placed a small building on the land in which he spent his nights until the spring of 1873 when he removed and never after resided there or made improvements. Proceedings were taken to cancel his entry, and it was cancelled in September, 1879. In July, 1882, the plat of definite location was filed, and the land in controversy is within forty miles of the general route, and within twenty miles of the line of definite location. In August, 1882, McLean died, leaving a will devising this land to his widow, which was duly probated. In March, 1883, McLean's widow applied, as his widow under the act of June 15, 1880, c. 227, 21 Stat. 237, to purchase the tract. *Held:*

- (1) That whatever rights Scott might have acquired by his original declaratory statement, were lost by his amended declaratory statement;
- (2) That McLean had all the rights which attached to a valid entry, and might have proceeded under the act of June 15, 1880, c. 227, 21 Stat. 237, to make the purchase thereby authorized;
- (3) That his widow, having had this tract devised to her by her husband's will, duly probated, was entitled to purchase the tract as the devisee of her husband, although her application for it was made as his widow.

Statement of the Case.

THIS was an action of ejectment commenced on May 8, 1891, in the Circuit Court of the United States for the District of Montana by the railroad company, plaintiff in error, to recover possession of the south one half of the northwest one quarter of section 17, township 10 north, range 3 west of the principal meridian of Montana. A trial was had, which resulted in a judgment for the plaintiff. 53 Fed. Rep. 48. This judgment was reversed by the Court of Appeals for the Ninth Circuit, 15 U. S. App. 279, and the case remanded for a new trial. The new trial was had before the Circuit Court upon an agreed statement of facts, and resulted in a judgment for the defendants, which judgment was affirmed by the Court of Appeals, and thereupon the plaintiff sued out this writ of error.

The important facts are these: On February 21, 1872, the railroad company filed in the office of the Commissioner of the General Land Office its map of general route through the then Territory (now State) of Montana. On April 22, 1872, the Commissioner, by direction of the Secretary of the Interior, transmitted to the local land office in Montana a diagram showing the portion of the line of general route extending through that district, and directed the withholding from sale or location, preëmption or homestead entry, the odd-numbered sections within forty miles of such general route. This diagram and order were received and filed in the local office on May 6, 1872. On May 3, 1872, three days before the order was received at the local land office, William McLean, a citizen of the United States and duly qualified to enter the land, made a homestead entry on the tract in controversy. In that fall he moved a small building onto the land and spent his nights there until the spring of 1873, when he married, removed from the premises, and never thereafter resided or made any improvements thereon. Proceedings were taken to cancel his homestead entry, and upon September 11, 1879, it was cancelled. On July 6, 1882, the railroad company filed a plat of the definite location of that portion of its line adjacent to the premises, and thereafter duly constructed its road on that line. The land is within forty miles of the line of general route, and also within twenty miles of the line of definite location and

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construction. McLean died in August, 1882, leaving a will by which he devised the tract to his widow. This will was duly admitted to probate.

On April 21, 1876, Congress passed an act, c. 72, 19 Stat. 35, the first section of which is —

“Sec. 1. That all preëmption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the preëmption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.”

And on June 15, 1880, it passed another act, c. 227, 21 Stat. 237, the second section of which is —

“That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the Government upon said lands shall be taken as part payment of said price: *Provided*, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.”

On March 15, 1883, the widow of William McLean applied under this last act for the purchase of the tract. Her application was made as widow and not by virtue of any right given by the will of her husband. Her application was contested by the railroad company but sustained by the Commissioner of the General Land Office, and afterwards by the

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Secretary of the Interior, and on his decision a patent was duly issued to her. Whereupon this suit was brought to test the title conveyed by such patent.

Mr. James B. Kerr for plaintiff in error. *Mr. C. W. Bunn* was on his brief.

No appearance for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The contest in this case is between one claiming under a homestead entry and a company claiming under a grant in aid of a railroad. It was long ago said by this court that "the policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person," *Clements v. Warner*, 24 How. 394, 397; and in a later case, that "the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon." *Ard v. Brandon*, 156 U. S. 537, 543.

There is no real hardship in enforcing this rule, for if the individual seeking to maintain his homestead entry fails by reason of any defect he has no recourse on the Government for the fees he has paid or for any compensation for the time and labor he has expended, while on the other hand the general provision of railroad land grants is to the effect that if the title to any tract within the place limits fails the company may reimburse itself by a selection within the indemnity limits. It is not therefore strange that the rulings of the land department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land.

Yet this would never justify an ignoring of the clear rights of the company, for the purpose of Congress in the grant must be recognized and made effective in every case to which the grant applies.

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On October 5, 1868, and prior to the filing of the map of general route, there was, as appears from the agreed statement, a preëmption declaratory statement made by William M. Scott. In 1869 he settled upon the tract, built a house and resided in it, but in the fall of that year abandoned the land, moved to Helena, and never returned. On October 14, 1872, he filed an amended preëmption declaratory statement wholly excluding the land in controversy and substituting other land. Whatever right Scott may have acquired by his original declaratory statement was clearly lost by his amended declaratory statement. Indeed, it had undoubtedly lapsed long before. *Northern Pacific Railway v. De Lacey*, 174 U. S. 622.

We need, therefore, only concern ourselves with the action of McLean. He did not make his homestead entry prior to the filing of the map of general route, but did before notice thereof was received in the local land office, and it is not disputed by counsel for the railroad company that if he had perfected that entry the act of 1876 would have operated to confirm his title. But the contention is that the act only applies when, as it reads, "the preëmption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels;" and it is urged that, as the agreed statement shows that McLean abandoned the land in 1873, and thereafter never complied with the requirements of the homestead law, he was not in a condition to claim any right to the land, because under the law in force at the time he made his original entry the land was not subject to entry, *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 72, and he could claim nothing under the act of 1876, because he did not comply with the homestead laws, or file proper proofs of any compliance therewith. In other words, it said that the land was not subject to homestead entry when he entered it, and that his entry was not made valid by the act of 1876; and therefore that the act of 1880 has no application to this case.

The writer of this opinion is much impressed with the force of these contentions, but a majority of the court hold that

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they give too much force to the letter of the statutes, and do not carry out their real spirit. They are of opinion that the effect of the act of 1876 was to validate all otherwise regular preëmption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time when the map of general route was filed in the office of the Secretary of the Interior and the order of withdrawal made; that the withdrawal authorized by the sixth section of the act making the land grant to the Northern Pacific Railway Company (13 Stat. 365, 369) did not vest in the company any title to the lands within the withdrawal limits, but only operated by legislative declaration and subsequent executive action to withdraw those lands from homestead or preëmption entries; that the right of the railroad company to any tract only became vested when the line of definite location was filed, and that up to that time Congress had full power to order a cancellation of the withdrawal or to make any disposition of lands within those limits which it saw fit; and that this act of 1876, rightfully construed and in accordance with the spirit of Congressional dealings with individual homesteaders and preëmptors, is to be taken as a legislative enactment that no entry was to be considered invalidated by reason of the filing of the map of general route if it was made before notice of the withdrawal was received at the local land office. If this be the true construction of this act, then McLean had all the rights which attached to a valid entry, and might have proceeded under the act of 1880 to make the purchase thereby authorized.

Before, however, the act of 1880 was passed his entry had been cancelled by reason of a failure to comply with the requirements of the homestead law in occupation, proofs and payment of the final fees. Indeed, he could not have made the proofs because he had abandoned the land. But the act of 1880 was passed before the railroad was definitely located adjacent to this land, and it was the opinion of the Circuit Court of Appeals, which is approved by a majority of this court, that its effect was to except the tract from the grant

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to the Northern Pacific. That grant was of land to which "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights at the time the line of said road is definitely fixed." Counsel for the railroad company contend that this right of McLean to purchase this tract was no other or different than the right of any duly qualified citizen of the United States to purchase any tract of public lands, and that as this right had not been exercised at the time the line of definite location was fixed, it could not be said that at that time any right had attached. But we think it is not a true construction of the land laws that a specified right given to a limited class to take by purchase particular tracts is in any just sense the equivalent of the general right of all citizens to purchase public lands. It is not a strained but a reasonable construction to hold that Congress by this act of 1880, "appropriated" these particular tracts, thus covered by homestead entries, even of an outlawed class, for the benefit of those homesteaders, and that they were no longer to be counted among the public lands of the United States subject to the grant to the railroad company.

One other question is presented by counsel for plaintiff in error. The right given by the act of 1880 is to the entrymen and persons to whom their rights have been transferred by "*bona fide* instruments in writing." It is contended that a widow cannot avail herself of the benefit of that statute because she does not take by any *bona fide* instrument in writing.

It is true that the application to the land office upon which the patent was issued was based upon her right as widow, and it may be questionable whether a widow is within the scope of that act; but the agreed statement of facts shows that McLean by will devised this tract to her, and that the will was duly probated; so that she held a right not simply as widow, but as devisee, taking under a *bona fide* instrument in writing, and it certainly cannot operate to defeat her right under that instrument that the land department recognized her right as widow.

For these reasons the judgment of the Circuit Court of Appeals is

Affirmed.